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No. 66.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1930.

NORTHPORT POWER AND LIGHT COMPANY, a corporation, Appellant,

v.

ROLAND H. HARTLEY, as Governor, of the State of Washington, and JOHN H. DUNBAR, as Attorney General of the State of Washington, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLEES

JOHN H. DUNBAR,
Attorney General,

JOHN A. HOMER,
Assistant Attorney General,

Attorneys for Appellees.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLEES

STATEMENT.

As appears from the complaint, plaintiff (appellant here), is a corporation organized under the laws of the state of Washington, a majority of its capital stock being owned by the West Kootenay

Power & Light Company, Ltd., of Canada, an alien corporation. It was organized in the year 1917 and was empowered by its articles of incorporation to engage in the generation and distribution of electrical current for power and light purposes. Shortly after it was organized, it obtained conveyances for a right-of-way and easement for the erection and maintenance of a power transmission line from a point three miles north of the Canadian border southerly to the town of Northport and certain nearby mining claims which it is developing, in Stevens county, Washington. Prior to and at the time of the commencement of this action, it was securing electric current from across the Canadian border and transmitting it on its power lines from thence to the town of Northport, where it was furnishing municipal light, and to its mining properties for use in their development.

Plaintiff commenced this action against the governor and attorney general of the state of Washington in the United States District Court of Washington, seeking to enjoin them from instituting an action in the state court to escheat its power lines, easements and rights-of-way on the ground that its ownership thereof was prohibited by a provision of the Washington State Constitution and an act passed by the legislature of the state of Washington in the year 1921, prohibiting the ownership of lands in the state of Washington by an alien, or by a corporation when a majority of the stock of the corporation is of alien

ownership. It is alleged in the complaint that the section of the constitution of the state of Washington and the act of 1921 in question are in contravention of and repugnant to the Commerce Clause, the Contract Clause, the Due Process and Equal Protection Clauses of the Federal Constitution; and the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827.

An application was made by plaintiff for a temporary injunction, and a motion to dismiss was filed by defendants. After a hearing thereon before Judge Dietrich of the 9th Circuit Court of Appeals and Judge Bourquin and Judge Cushman, district judges, the court unanimously denied the application for an interlocutory injunction and dismissed the action upon the ground that as plaintiff had a plain, adequate and complete remedy at law the district court had no jurisdiction. From the judgment and decree of dismissal, plaintiff appealed direct to this court under section 266 of the United States Judicial Code.

SUMMARY.

POINTS AND AUTHORITIES.

I.

The United States Court had no jurisdiction of the subject matter of the action, because—

(a) Appellant had a plain, adequate and complete remedy at law.

Section 267 U. S. Jud. Code, Section 384, U. S. C. A.;

Cable v. U. S. Life Ins. Co., 191 U. S. 288;

Boise Artesian Water Co. v. Boise City, 213 U. S. 276;

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481;

Dalton Adding Machine Co. v. State Corp. Com., 236 U. S. 699;

Toop v. Ulysses Land Co., 237 U. S. 580;

Cavanaugh v. Looney, 248 U. S. 453;

Amer. Mills Co. v. Amer. Surety Co., 260 U. S. 360;

Georgia v. Chattanooga, 264 U. S. 472;

Thompson v. Schwaebe, (9th C. C. A.), 22 Fed. (2nd) 518;

New York Life Ins. Co. v. Marshall, (5th C. C. A.), 23 Fed. (2nd) 225.

(b) This action is in effect a suit against the State of Washington and is prohibited by the 11th Amendment to the United States Constitution. Although the state is *eo nomine* not a party, it is the real party in interest. The action is brought against the governor and the attorney general to enjoin them as state officials from instituting an action at law in

a state court. Any such action would necessarily be in the name of and for the sole use and benefit of the state.

Hagood v. Southern, 117 U. S. 52;
In re Ayers, 123 U. S. 443;
North Carolina v. Temple, 134 U. S. 22;
Fitts v. McGhee, 172 U. S. 516;
Minnesota v. Hitchcock, 185 U. S. 373;
Farmers' Natl. Bank of Hudson v. Jones, 105 Fed. 459;
Central of Georgia Ry. v. McLendon, 157 Fed. 961;
Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 91;
Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 94;
Robertson v. H. Weston Lumber Co., 87 So. (Miss.) 120;
State ex rel. Gordon v. State Board of Control, 102 S. E. (W. Va.) 688;
Red Star Line v. Baughman, 139 Atl. (Md.) 291.

(c) There is no diversity of citizenship to confer jurisdiction, appellant being a domestic corporation and the state not being a citizen within the meaning of the constitution and acts of Congress, therefore, the only grounds on which jurisdiction could be retained would be that a Federal question is presented.

Minnesota v. Northern Securities Co., 194 U. S. 48.

(d) It cannot be seriously urged that a Federal question is involved in the case which was not settled

adversely to contention of appellant in case of *Terrace v. Thompson*, 263 U. S. 197, involving the same constitutional and statutory prohibitions against alien ownership of lands in Washington. The 1921 act (ch. 50, L. '21) should be left out of consideration as two decisions of the Washington supreme court have decided that that act would not apply to conveyances or transactions occurring prior to its enactment. (*State v. Natsuhara*, 136 Wash. 437; *State v. Motomatsu*, 139 Wash. 639.) Appellant takes this view in its brief on pages 28 and 29, and we agree with the view. Therefore, the case should be determined under the state constitution and in disregard of the statute, and as the constitution was in effect in 1889, long prior to the year 1917 when appellant obtained its conveyances of the land in question, no Federal question can be made to rest on the alleged violation of the Contract Clause of the Federal Constitution; nor, does the alleged violation of the Commerce Clause present a Federal question which was not in principle settled in *Terrace v. Thompson*, 263 U. S. 197. That case held that the right of an alien to engage in occupation and the right of a citizen to dispose of and deal with his land were subject to the right of the state to prohibit leasing of land to an alien, and that the Due Process and Equal Protection clauses of the Federal Constitution were not violated by such a prohibition; therefore, the Commerce Clause is of no greater effect against the state's right to prohibit alien ownership than the Due Process or

Equal Protection clauses. For these reasons no Federal question with merit is presented.

(e) The claimed violation of the treaty of 1815 between the United States and Great Britain, as extended and continued by the treaty of 1827, so patently applies to the territories of Great Britain in Europe and not to Canada as to amount to a frivolous claim; furthermore, even if the provisions of the treaty did apply to Canada, there is nothing to show that appellant, as a corporation of Washington, is in anywise, as a subject of Great Britain, or otherwise, entitled to any rights or protection under the treaty.

Toop v. Ulysses Land Co., 237 U. S. 580.

Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers 1776-1909, by Malloy, Vol. 1, page 625; 8 U. S. Stat. at Large, pp. 228, 360.

(f) This appeal is taken direct to this court from the decision of the U. S. District Court, under section 266 of the Judicial Code. As the only question before the court is whether a provision of the Washington constitution is valid, the act of 1921, having no application, as is conceded by both parties to the appeal, section 266 of the Judicial Code has no application and cannot sustain this appeal, as that section relates only to an alleged unconstitutional state statute. No direct appeal is allowed to this court in an action attacking as invalid a provision of a state constitution.

II.

An alien, or a corporation of which a majority of its capital stock is owned by aliens, is prohibited from owning lands in the state of Washington.

Article II, section 33, Washington State Constitution;

State ex rel. Winston v. Morrison, 18 Wash. 664;

State ex rel. Winston v. Hudson Land Co., 19 Wash. 85;

State ex rel. Morrell v. Superior Court, 33 Wash. 542.

III.

The state's sovereignty over real property within its borders is supreme. It may prohibit alien ownership and may provide by statute the method by which ownership may be acquired, retained and lost and generally all questions regulating rights and interests therein and devolution of title. The only restriction on the power of the state in this respect is that rights safeguarded by treaty shall not be violated.

United States v. Fox, 94 U. S. 315;
Hauenstein v. Lynham, 100 U. S. 483;
De Vaughan v. Hutchinson, 165 U. S. 566;
Blythe v. Hinckley, 173 U. S. 501;
Munday v. Wisconsin Trust Co., 252 U. S. 499;
Heck v. Nichols (8th C. C. A.), 6 Fed. (2d) 10;
State v. O'Connell, 121 Wash. 542;
1 Ruling Case Law, 806.

IV.

Under the police power the state may prohibit ownership of lands by aliens or by a corporation, a majority of the stock of which is owned by aliens. Such laws are enacted under the police power and do not violate the Due Process and Equal Protection Clauses of the Federal Constitution, and consequently should not be held to violate the Commerce Clause or Contract Clause of the Constitution. The only limitation of the state's power in this respect is that the prohibition shall not transcend the rights of aliens given by treaty.

Terrace v. Thompson, 263 U. S. 197;
Terrace v. Thompson, 274 Fed. 841;
Porterfield v. Webb, 263 U. S. 225;
Webb v. O'Brien, 263 U. S. 313;
Frick v. Webb, 263 U. S. 326;
State v. O'Connell, 121 Wash. 542.

The Commerce Clause does not prohibit the state, under its police powers, from enactments affecting interstate commerce.

Mugler v. Kansas, 123 U. S. 623;
Kidd v. Pearson, 128 U. S. 26;
Fritts v. Palmer, 132 U. S. 282;
Postal Telegraph Cable Co. v. Adams, 155 U. S. 688;
Geer v. Conn., 161 U. S. 519;
Henderson Bridge Co. v. Ky., 166 U. S. 150;
Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611;
New York, ex rel. Silz v. Hersterberg, 211 U. S. 31;
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Interstate Amusement Co. v. Albert, 239 U. S. 560;
St. L. I. M. & S. R. Co. v. Ark., 240 U. S. 518;
Gulf C. & S. F. R. Co. v. Tex., 246 U. S. 58;
Munday v. Wisconsin Trust Co., 252 U. S. 499;
O. W. R. & N. Co. v. Wash., 270 U. S. 87.

V.

Although we think the case should be decided solely upon the effect of the Washington constitutional provision, and not the statute, in which event the Contract Clause could not be involved because the conveyances were made subsequent to the adoption of the Washington constitution, still, if considered under the statute, the statute having been enacted under the police power of the state, the Contract Clause must yield to a valid exercise of the police power.

Terrace v. Thompson, 263 U. S. 197;
Terrace v. Thompson, 274 Fed. 841;
Union Dry Goods Co. v. Georgia Pub. Service Corp., 248 U. S. 372;
Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548;
Manigault v. Springs, 199 U. S. 473;
Marcus Brown Co. v. Feldman, 256 U. S. 170;
Levy Leasing Co. v. Siegel, 258 U. S. 242;
Raymond Lumber Co. v. Raymond Light & Water Co., 92 Wash. 330;
State ex rel. Pratt v. Seattle, 73 Wash. 396.

VI.

The rights and interests in real estate acquired by appellant and the conveyances made to it are per-

petual easements of a right of way in definitely described lands for the construction, maintenance and operation of its power lines, and as such, constitute an interest in and ownership of real estate prohibited under the constitution of Washington to a corporation with a majority of its stock owned by an alien.

State ex rel. Winston v. Morrison, 18 Wash. 664;

State ex rel. Winston v. Hudson Land Co., 19 Wash. 85;

State ex rel. Morrell v. Sup. Court, 33 Wash. 542;

Moeller v. Gormley, 44 Wash. 465;

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Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co., 102 Wash. 608;

United States v. Welch, 217 U. S. 333;

Western Union Tel. Co. v. Georgia R. & B. Co., 227 Fed. 276;

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Wyatt v. Larimer & Weld Irr. Co., (Colo.) 33 Pac. 144;

Cook v. The C. B. & Q. R. Co., 40 Ia. 451;

Goodrich v. Burbank, 12 Allen (Mass.) 459.

VII.

The Treaty of Commerce & Navigation between the United States and Great Britain, proclaimed December 22, 1815, as extended and continued by the treaty of 1827, as will appear from its positive terms, does not afford any rights to any subjects or terri-

tories of Great Britain except its European territories; and in any event appellant, although declared an alien because a majority of its stock is owned by an alien corporation, is not declared an alien of any particular foreign nation, and does not show that either as a corporation, or through any other corporation or individuals, or otherwise, that it is entitled to any rights under this treaty, or any other.

8 U. S. Stat. at L. 228, 360—Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909, by Malloy, pp. 624, 645;

Complaint, par. VII (Rec. p. 3).

ARGUMENT.

JURISDICTION.

The motion to dismiss (Rec. p. 55) was on the following grounds:

1. Said bill of complaint does not state any matters of equity entitling plaintiff to the relief prayed for;

2. Said bill of complaint does not state facts sufficient to entitle plaintiff to any relief against these defendants, or either of them;

3. The plaintiff has a plain, adequate and complete remedy at law.

The decree of dismissal (Rec. p. 63) was granted upon the grounds set forth therein that the court had no jurisdiction of the action because it appeared from the complaint that plaintiff had a plain, adequate and complete remedy at law.

The decision of the three judges (35 Fed. 2nd, 199) (Rec. p. 55) was based on the case of *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, and *Cavanaugh v. Looney*, 238 U. S. 453.

The *Boise* case was an action by a corporation to enjoin certain city officials of the city of Boise from enforcing an ordinance levying a tax against the corporation for the privilege of maintaining water pipes in the city streets. It was claimed that the city was threatening to remove the pipes and works of the corporation, and that the threats cast a cloud upon the company's franchise; that it impaired

the obligation of a contract made between the corporation and the city by previous ordinances and that the enforcement of the ordinance would deprive the company of its property without due process of law, and abridge the privileges and immunities granted by the 14th amendment. The court, on page 281, says:

"It is obvious that the rights of which the company seeks to avail itself are cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company's contention is that the imposition of the license fee was illegal, unconstitutional and void. All these contentions are open in a court of law. It is a guiding rule in equity that in such a case it will not interpose where there is a plain, adequate and complete remedy at law."

In *Cavanaugh v. Looney*, 238 U. S. 453, the jurisdiction of the court was sought to enjoin the University of Texas from instituting an action at law to condemn a tract of land for the use of the university. The special court assembled as provided by section 266, Judicial Code, denied the application for a preliminary injunction and allowed a direct appeal. The land owner asserted that the legislative act under which the state was proceeding with the condemnation violated both state and Federal constitutions and that the filing of the petition for condemnation would cause irreparable loss and damage. The court, on page 456, says:

"When considered in connection with established rules of law relating to the power of eminent domain, complainant's allegation of threatened 'irreparable loss and damage' appears fanciful. The total circumstance negatives such view and rather tends to

support the contrary one. Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny the Federal right, an appropriate and adequate remedy by review here is obvious."

In *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, the company sought to restrain the collection of taxes levied by the city and county of Denver, state of Colorado, and asserted that to enforce the collection of such taxes would be violative of certain provisions of the Constitution of the United States. The action was dismissed in the district court and on the appeal to the Circuit Court of Appeals, that court held that there was an adequate remedy at law and affirmed the decree from which the appeal was taken to this court. On page 484 the court says:

"In the courts of the United States it is a guiding rule that an appeal in equity does not lie in any case where plain, adequate and complete remedy may be had at law. The statute so declares (Rev. Stat. Sec. 723) and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*."

In the case of *Dalton Adding Machine Company v. State Corporation Commission*, 236 U. S. 699, a Missouri corporation sought to enjoin the Virginia officials from enforcing a state statute requiring foreign corporations doing business in the state to ob-

tain a license. The company contended that its business in Virginia was wholly interstate and that the actions of the Virginia officials would violate the Commerce Clause of the Federal Constitution. The appeal to this court was from an order of three judges denying a preliminary injunction. On page 701 the court says:

"The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule."

The case of *Georgia v. Chattanooga*, 264 U. S. 472, was an original action in this court by the state of Georgia to enjoin the city of Chattanooga from prosecuting in the court of Tennessee proceedings to condemn part of a railroad yard owned by that state in that city. It was contended by Georgia that the condemnation suit under which proceedings were to be taken did not afford Georgia and other owners reasonable notice and opportunity to be heard before the final determination of judicial questions that might be involved in the condemnation proceedings, e. g., whether the statute had delegated to the state the power to condemn and whether the taking was for a public purpose. On page 483, the court says:

"The plaintiff's (Georgia's) objections and defenses may be interposed in the Tennessee court. It appears on the face of the bill of complaint that, if it so elects, Georgia has a plain, adequate and complete remedy in the condemnation proceedings instituted

by the city. Its contention that the requisite power to condemn has not been delegated to the city involves a consideration of the meaning and proper application of the laws of Tennessee, and it is especially appropriate that the Tennessee courts shall first decide the question. * * * If the decision of that court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reexamination and review. That suits in equity will not be sustained in any case where a plain, adequate and complete remedy may be had at law is declared by statute (Jud. Code, sec. 267) and established by decisions of this court so numerous that citation is not necessary."

See also to the same effect:

Cable v. U. S. Life Insurance Company, 191 U. S. 288;

Thompson v. Schwaebe, (9 C. C. A.) 22 Fed. (2d) 518;

New York Life Ins. Co. v. Marshall, (5 C. C. A.) 23 Fed. (2d) 225.

Although this court in *Terrace v. Thompson*, 263 U. S. 197, sustained the jurisdiction of the United States District Court to entertain a suit for injunction against the enforcement of the anti-alien land law of Washington (chap. 50, L. 1921), Mr. Justice McReynolds and Mr. Justice Brandeis, although concurring in the decree of the district court dismissing the action, added that in their opinion "there is no justiciable question involved and that the case should have been dismissed on that ground." The court sustained the jurisdiction of the court in that case, but it did so on the ground that in order for the complainant to obtain a remedy at law, it would be

necessary for them to consummate the proposed lease which the threatened enforcement of the law deterred, and that even if they would take the risk of a fine and imprisonment and loss of property they must continue to suffer the deprivation of their right to dispose of or lease their lands to any alien, until one could be found who would join with them in violating the terms of the statute and taking the risk of forfeiture, and that in the meantime the Japanese must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who would be willing to make a forbidden transfer of land and take the risk of punishment. In the case now before the court, no such risks or threats face the appellant, no fines or penalties are threatened and no action is threatened except an action in a state court in which, as has been pointed out in the quotations above, the appellant would be able to assert any and all constitutional objections and rights, and which would afford it a complete, adequate, practical and efficient remedy at law. Therefore, *Terrace v. Thompson*, 263 U. S. 197, although sustaining jurisdiction in that case, shows clearly that no jurisdiction obtains in the case at bar by reason of the difference in the facts of the two cases.

We deem it unnecessary and hardly worth while to take each of the cases cited by appellant on pages 11 to 25 of its brief to sustain its claim of jurisdiction in the Federal Court, and, by an analysis of the facts, prove that they are not controlling. Generally, the

cases cited involve actions to enjoin the collection of taxes and special assessments imposed by state authorities which created a lien upon the property of the plaintiff and in which no remedy was afforded by paying the taxes under protest and recovering the same in an action at law; or actions in which a multiplicity of suits was avoided; or actions enjoining statutes or orders fixing public utility rates alleged to be confiscatory; or actions to prevent the revocation of franchise rights and the establishment of a competitive business, or actions to prevent the enforcement of an alleged unconstitutional criminal law where a property right was involved and the penalties were severe.

In all of such cases, where diversity of citizenship exists and the proper amount is involved, or where a Federal question is involved, the jurisdiction of the United States Court has become settled beyond dispute.

The case at bar does not fall within the class of any of such cases. Here there is no multiplicity of suits threatened or avoided; there has been no action taken and none threatened which will interfere with any property rights of appellant until after an adjudication in a court of law that such action may be legally taken; there is no threat of any enforcement of a criminal statute in which excessive fines and penalties may be invoked. Although in some parts of its brief appellant argues on the assumption that the state officials were about to physically enter upon

and take possession of its property, without taking any court action, such is not the case, the allegations of the complaint being that a law action of escheat is threatened. It is on this assumption that appellant attempts to distinguish the cases cited in the Federal District Court decisions (*Boise Artesian Water Co. v. Boise City*, 213 U. S. 276; *Cavanaugh v. Looney*, 248 U. S. 453). We submit that the only phases before the court are the allegations of the complaint to the effect that the state officials had threatened to institute in the state court escheat proceedings. On this state of facts no irreparable damage or injury can be inflicted upon appellant or its property or rights, and no action can or will be taken with respect to any ouster proceedings except by an action in a law court of the state in which appellant will be afforded full opportunity to contest the propriety and legality of the statute and the threatened action.

We admit that in some of the cases cited by appellant it has been stated that an adequate remedy at law must exist in the Federal court, and in one, a decision by a United States District judge (*Fredenberg v. Whitney*, (Wash.) 240 Fed. 819) that the legal remedy must be one that plaintiff may institute. In some of the cases cited by appellant it was stated that for an adequate remedy at law to exist it must exist in a Federal court, and in others, that if the action is brought in equity, and an adequate remedy was available in law, the action should be transferred to the law side of the court. We admit that we know

of no means by which appellant would be able to institute any action at law in a Federal or state court for the purpose of having determined the issues which it seeks to raise in this action, nor do we believe that the decision of the district judge in *Fredenberg v. Whitney*, 240 Fed. 819, to that effect, is consistent with the many decisions of this court denying to the United States courts equity jurisdiction; nor do we know of any means by which this action may be transferred to the law side of the Federal court; nor do we wish to admit that if the action were instituted by the state in a state court that it could be removed to the Federal court, but it probably could, provided it could be made to appear that a meritorious constitutional question was involved, and if this be true, the objection would be met that, as stated in one or two of the cases cited by appellant, the remedy at law should be one available to the plaintiff in a Federal court. In any event, in an action brought by the state in a state court, appellant would be permitted to raise all Federal and state constitutional questions, and would be entitled to an appeal to the state supreme court and by writ of error to come to this court for a decision on all Federal questions, as was pointed out by this court in *Georgia v. Chattanooga*, 264 U. S. 472, and in many other cases.

FEDERAL QUESTION.

We believe that a careful consideration of the issues raised by the complaint and the motions to dis-

miss will show that no substantial reason exists for urging that a Federal question or a treaty right is seriously involved in this proceeding. The complaint alleges that the governor and attorney general had threatened to institute escheat proceedings in the state court against appellant under section 33, article II of the state constitution, and under the provisions of chapter 50, Laws of 1921, prohibiting ownership of lands by an alien or by a corporation in which the majority of its capital stock is owned by an alien, and alleges that such action will be in violation of the rights and protection guaranteed appellant under the Commerce Clause, the Contract Clause and Due Process and Equal Protection Clauses of the United States Constitution and the 1815 Commerce Treaty between the United States and Great Britain, as extended and continued by the Treaty of 1827.

In the case of *Terrace v. Thompson*, 263 U. S. 197, this court had before it for consideration the same state constitutional provision and the same statute, and in that case it was held that the state, under its police power, reserved at the time of the adoption of the constitution, in the absence of any treaty provision to the contrary, had power to deny to aliens the right to own land within its borders and that the particular provision of the constitution and the particular statute assailed in the case at bar were not in violation of the Due Process or Equal Protection clauses of the Fourteenth Amendment. We submit that if this constitutional provision and this statute

do not violate the Due Process or Equal Protection Clauses of the United States Constitution, how, we ask, can it seriously or in good faith be contended that it violates the Commerce Clause or the Contract Clause of the United States Constitution? As to the Contract Clause, we believe that it is not in any sense involved because it is idle to assume, although it is alleged, that the state will proceed to enforce the provisions of chapter 50, Laws of 1921, in the face of two decisions of the highest court of the state (*State v. Natsuhara*, 136 Wash. 437, and *State v. Motomatsu*, 139 Wash. 639) that that statute has no retroactive effect and does not apply to conveyances or rights secured prior to the time it took effect on June 8, 1921. The appellant's conveyances and property rights were secured in the year 1917. The view that the statute should be given no consideration is taken by appellant on pages 28 and 29 of its brief, and this view is concurred in by appellees. This leaves the Contract Clause entirely out of consideration.

In view of the fact that this court has unqualifiedly sustained the Washington constitutional provision and statute against an attack based on violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, we are unable to see how it can seriously be contended that the constitutional provision or statute violates the Commerce or Contract Clauses of the United States Constitution. For these reasons we believe the district court was without any jurisdiction in the premises, as the con-

stitutional ground is the only ground on which any jurisdiction could be ~~raised~~, there being no diversity of citizenship.

TREATY.

As to the claimed violation of treaty rights, we see no ground for that contention. Article 1 of the treaty, following the preamble, reads as follows:

"There shall be between the territories of the United States of America, and all the territories of His Britannick Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

This provision in no manner affords any protection to a Canadian subject or applies to Canadian territory. Its operations are limited to the territories of Great Britain in Europe. Appellant makes the contention on pages 63 and 64 of its brief that, because the concluding paragraph of article II of the treaty provides that "intercourse between the United States and his Britannick Majesty's possessions in the West Indies and on the continent of North America shall not be affected by any of the

provisions of this article," every other part of the treaty should apply to the Dominion of Canada. This, in the face of the express provisions of article I of the treaty that it applies only to the territories of Great Britain in Europe. Article I is the only provision of the treaty, if any, in which the subject matter of the treaty in anywise affects appellant. Furthermore, it seems plain that, in any event, even if Canada were expressly named in the treaty and expressly brought within its provisions, it would afford no protection to appellant. Article I of the treaty confers four rights on British subjects: (1) Liberty freely and securely to come with their ships and cargoes; (2) to remain and reside in United States territory; (3) to hire and occupy houses and warehouses for the purposes of their commerce; and (4) merchants and traders are granted protection and security for their commerce. This treaty clearly refers to commerce by water and is not intended to grant any rights with respect to any other commerce. This would naturally be the purpose of the treaty in view of the fact that it expressly states that it applies to British European territories and the United States, which are of course separated by water; and the use of the word "commerce" therein undoubtedly relates to such commerce as may be carried on between the inhabitants of the two nations by water. But, even if the word "commerce" as there used should apply to the definition of that term a century and a quarter after the treaty was adopted, still, commerce is men-

tioned only in two clauses. In one of such clauses it gives the inhabitants of the contracting parties the right to hire and occupy houses or warehouses for the purpose of their commerce. No house or warehouse used by appellant is involved in this action and no right to use a house or warehouse used for commerce is claimed to be affected by any threatened action of the state in this case. The other clause of article I of the treaty which mentions commerce gives to merchants and traders of each nation the right to enjoy the most complete protection and security for their commerce. As to that provision, we submit that appellant is in no sense a merchant or a trader or subject to or entitled to any protection under that clause.

Furthermore, it should be borne in mind that appellant is a corporation organized under the laws of Washington, with a majority of its stock owned by an alien corporation. Such a corporation is, for the purpose of the state constitutional provision declared to be an alien. But it is not declared to be an alien of any particular nation. The complaint (Par. VII; Rec. p. 3) shows that the majority of the capital stock is owned by the "West Kootenay Power and Light Company, Ltd., of Canada, an alien corporation." This allegation does not show that the corporation is a Canadian corporation, and does not show that it was organized under the laws of any particular nation. Appellant seems to assume that by virtue of this allegation it is a Canadian and consequently a British subject and in some manner afforded some

rights and protection by the British treaty, but assuming that the treaty would afford rights to subjects of Great Britain to organize a corporation to carry on such commerce as is within the protection of the treaty, appellant in no sense shows that it is a subject of Great Britain and entitled to any rights under the treaty.

Therefore, it being so patent that Canadian territory was in no event covered by the treaty of 1815, and that, if it were, appellant is not within any of the protected rights of the treaty, we feel absolutely safe in saying that, in so far as the jurisdiction of the court rests on the claim that a treaty right is involved, such a claim is fanciful and wholly untenable, and therefore jurisdiction could not with a show of sincerity be predicated on the violation of a treaty right.

Section 266, Judicial Code.

The prosecution of this action proceeded under section 266 of United States Judicial Code (sec. 380, U. S. C. A.). An application was made for an interlocutory injunction. Upon the hearing the interlocutory injunction was denied and the action dismissed on the grounds that the court had no jurisdiction because it appeared to the court that plaintiff had an adequate remedy at law. Following the hearing a decree of dismissal was entered and an appeal taken direct to this court. We have already referred to the fact and shown why the issues of this case should be

determined as if the only power the state or state officials have for any threatened escheat proceedings is that conferred by section 33 of article II of the Washington state constitution.

This appeal is taken direct to this court under section 266 of the U. S. Judicial Code, which permits a direct appeal when actions are brought to enjoin the enforcement or execution of an alleged unconstitutional state *statute*, and not on the ground of any action threatened under a provision of a state constitution. We realize that in pressing this point we are asking the court to ignore the allegations of the complaint to the effect that the state officials have threatened to enforce the provisions of the statute, and that the allegations of the complaint are ordinarily deemed to be admitted by the filing of a motion to dismiss, but we feel that we are justified in asking the court to do this in view of the fact that appellant takes the position in its brief that the case should be decided on the basis of the state constitutional provision and not on the statute, and that appellees concur in this view. If this be treated as an action to enjoin the state officials from enforcing a state constitutional provision, no direct appeal would lie to this court under the provisions of section 266 of the Judicial Code.

Eleventh Amendment.

This action is in effect an action against the state of Washington prohibited in a Federal court by the Eleventh Amendment to the United States constitu-

tion. This point was not urged in the district court, but it is our understanding that we are privileged to ask that the decision of the court be sustained on any ground upon which it might have been rested. Furthermore, we take it that a question of jurisdiction may be raised at any time. As was said by Mr. Justice Brewer in the case of *Minnesota v. Hitchcock*, 185 U. S. 373 (which, however, was one of original jurisdiction in this court), respecting the question of jurisdiction:

"A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desired that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter. * * *"

This action is brought against the governer and attorney general of the state. The state is not *eo nomine* a party, but any relief granted in this action to appellant would directly affect the power and interests of the state as effectively as if the state were named as a party to the decree. The action which it is sought to enjoin the governor and attorney general from instituting in the state courts would be an

action in the name of the state and for the direct and pecuniary benefit of the state. In other words, this is not an action merely against state officials to enjoin them from taking some action under a state regulatory act or statute enacted for the benefit of the public, in which cases it has been held that the action is not one against the state, but the action is one directly affecting the rights and interests of the state although the state is not named as an actual party, and in such cases the action has been held to be in effect an action against the state and prohibited by the Eleventh Amendment.

In the case of *In re Ayers*, 123 U. S. 443, this court held that a Federal court had no jurisdiction to enjoin the governor and attorney general of the state of Virginia from instituting an action to collect delinquent taxes. The court, on page 497, says:

"The relief sought is against the defendants, not in their individual, but in their representative capacity as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia in its own name and for its own use. If the State had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its Governor and Attorney General, according to the precedents in such cases. * * *"

And again on page 505, the court says:

"* * * The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial

tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

Appellant is a corporation organized under the laws of the state of Washington and therefore may be deemed a citizen of the state, but the right of the state to be immune from suit in the Federal court does not apply merely to citizens of another state or citizens or subjects of a foreign state. *Fitts v. McGhee,* 172 U. S. 516. In that case this court held that the United States circuit court had no jurisdiction of the suit against the state of Alabama and its governor and attorney general to enjoin the state from enforcing an act of the legislature fixing tolls on a bridge owned by a railroad company and in the

hands of receivers who were complainants in the case. On page 529, the court says:

"* * * As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record. If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state. In the case supposed, they would be compelled to make good the state's claim to the property, and could not shield themselves against suit because of their official character. * * * If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private

persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy, when proceeded against under a legislative enactment void for repugnacy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination."

See also, to the same effect:

Hagood v. Southern, 117 U. S. 52;
North Carolina v. Temple, 134 U. S. 22;
Minnesota v. Hitchcock, 185 U. S. 373;
Farmers National Bank of Hudson v. Jones, 105 Fed. 459;
Central of Georgia Ry. Co. v. McLendon, 157 Fed. 961;
Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 91;
Title Guaranty & Surety Co. v. Guernsey, 205 Fed. 94;
Robertson v. H. Weston Lumber Co., (Miss.) 87 So. 120;
State ex rel. Gordon v. State Board of Control, (W. Va.) 102 SE 688;
Red Star Line v. Baughman, (Md.) 139 Atl. 291.

MERITS.

Should the court determine that the district court had jurisdiction in this case, adversely to the contention of the appellees, appellant assumes that this court will then pass upon all the questions raised by the complaint, that is, whether or not rights

guaranteed by the Federal Constitution will be violated by the institution of escheat proceedings against it in the state court. It is our belief that this court in this hearing will determine only the question of whether the district court has jurisdiction of the case and if it determines that the district court did have jurisdiction to grant the relief prayed for by plaintiff that the action would be remanded to the district court for further proceedings. Appellant on pages 26 and 27 of its brief cites certain cases for the purpose of showing that the practice of this court would bring before it for consideration every issue that could have been considered by the district court. However, we do not think the cases cited establish that practice. For example, appellant quotes the following statement from the case of *Twist v. Prairie Oil and Gas Co.*, 274 U. S. 684: "The objection that the bill does not make a case within the equity jurisdiction of the Federal court goes not to the power of the court as a Federal court but to the merits," and also the following from the case of *Flanders v. Coleman*, 250 U. S. 223: "The opinion of the district court shows that it ~~only~~ considered the merits of the case in reaching the conclusion that it was without jurisdiction." Undoubtedly, in many cases, in considering the question as to whether or not the court has jurisdiction, the court in effect passes upon the merits, but certainly in the case at bar the district court did not in any sense consider or pass upon any of the constitutional questions

raised by the complaint, but determined only that from the nature of the action plaintiff had a plain, adequate and complete remedy at law and consequently entered its decree of dismissal. However, appellees have no objection whatever to the court considering all the issues of this case as raised by the complaint and the motion to dismiss, provided it is in accordance with the practice and desires of the court, even though all the issues were not considered or passed upon by the district court.

We therefore proceed to answer the contentions of appellant, as set forth in its brief, on the issues other than that relating to the question of jurisdiction. In doing this, we will assume that the case should be decided on the merits on the assumption that the only justification for any action to escheat the property of appellant is by virtue of the Washington constitutional inhibition against ownership of lands by aliens and not under chapter 50, Laws of 1921, because of the two decisions of the supreme court of Washington, heretofore cited, to the effect that chapter 50, Laws of 1921, has no application to conveyances or rights acquired prior to June 8, 1921, the effective date of the act. Considered on this basis, if there is any difference in the application of the law, it would be more favorable to appellant for the reason that the constitutional provision prohibits alien ownership of lands without defining what shall constitute such ownership, whereas chapter 50, Laws of 1921, defines ownership, or to "own,"

to mean "to have the legal or equitable title to or the right to any benefit of" the lands. As appellant's only interest or ownership of land is by virtue of certain right of way easements for a power line, it would follow that there would be less grounds for the contention that its title or interest is "ownership" within the language of the constitution than there would be for the same contention under the definition of ownership contained in the statute. Section 33 of article II of the state constitution provides as follows:

"The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition."

On this phase the court is called upon to determine (1) whether or not escheat proceedings under that constitutional provision would violate the Commerce Clause, the Contract Clause, the Due Process and Equal Protection Clauses of the Federal Constitution, or treaty rights under the Commerce and

Navigation Treaty of 1815, as extended and continued by the Treaty of 1827, between Great Britain and the United States, and (2) whether the interest, ownership and rights of appellant in the property in question is ownership of land such as is prohibited by the constitutional provision.

Federal Questions.

We will consider first the Federal constitutional questions.

Due Process and Equal Protection.

The general rule with respect to ownership of real property by aliens is stated in 1 Ruling Case Law, page 806, as follows:

"It is a general rule of the common law that the title to real property must be acquired and pass according to the *lex rei sitae*, and the rule applies not only to alienations and acquisitions made by the acts of the parties, but also to the estate and rights acquired by operation of law, the principle originally applicable as between countries entirely foreign to each other prevailing among the states of the American Union. From such a rule the doctrine results that, subject to treaty regulations, the title of aliens to lands within the limits of the several states is a matter of state regulation, and the right of foreigners to hold title to real estate is dependent upon the laws of the state in which the land is situate. A state may exclude aliens from acquiring property within its boundaries as its safety or policy may direct. This rule applies not only to alienations and acquisitions made by the acts of the parties, but also to estates and rights acquired by operation of law. In pursuance of this power, and in the absence of treaty regulation, a state may impose a succession tax on

all legacies or devises of property, within its domain, to an alien."

The right of the state to prohibit aliens from owning or acquiring lands, or any interest therein within its borders, is fully established by the decisions of many courts. All the decisions are unanimous in holding that such power exists in the state. The supreme court of Washington has sustained this right on the part of the state and under the constitutional provision quoted above. In the case of *State ex rel. Winston v. Morrison,* 18 Wash. 664, the court sustained an escheat, under section 33, article II of the State Constitution, *supra,* of a 99-year lease held by an alien; and in the case of *State ex rel. Winston v. Hudson Land Co.,* 19 Wash. 85, the court upheld an escheat of a 49-year lease held by a corporation, a majority of the capital stock of which was owned by aliens. Both of these cases were decided under the constitutional provision, and prior to the enactment of chapter 50, Laws of 1921.

In the case of *State v. O'Connell,* 121 Wash. 542, the supreme court of Washington sustained an escheat proceeding under chapter 50 of the Laws of 1921. On page 546, the court says:

"It has become the settled law of this country, that, in the absence of a treaty to the contrary, a state may lawfully prohibit aliens from owning or acquiring any lands, or any interest therein, within its borders."—citing

Orr v. Hodgson, 4 Wheat. (U. S.) 452;
Hauenstein v. Lynham, 100 U. S. 483;

U. S. v. Repentigny, 72 U. S. 211;
De Vaughn v. Hutchinson, 165 U. S. 566;
Blythe v. Hinkley, 180 U. S. 333;
Clarke v. Clarke, 178 U. S. 186;
Jones v. Jones, 234 U. S. 615;
Sullivan v. Kidd, 254 U. S. 433;
Terrace v. Thompson, 274 Fed. 841.

The case of *Terrace v. Thompson*, 263 U. S. 197, was instituted in the Federal district court of Washington to enjoin the attorney general from instituting escheat proceedings and from enforcing the provisions of chapter 50, Laws of 1921. The case was heard before three judges under section 266 of U. S. Judicial Code, and a decree was entered dismissing the action (274 Fed. 841) from which an appeal was taken by plaintiffs to this court. In this case the contention was made by appellants that the state statute was repugnant to the Due Process Clause and the Equal Protection Clause of the 14th Amendment. On page 216, the court says:

"The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the state, protects the owners in their right to lease or dispose of their lands for lawful purposes and an alien resident in his right to earn a living by following ordinary occupations of the community, but it does not take away from the state those powers of police that were reserved at the time of the adoption of the constitution. * * * And in the exercise of such powers, the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people. And, while Congress has exclusive jurisdiction

over immigration, naturalization and the disposal of the public domain, each state, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders."

In that case the court determined that the state statute applying alike to all aliens, withholding from them the right to own land, could not be deemed capricious or to amount to an arbitrary deprivation of liberty or property, or to transgress the Due Process Clause. It further determined that the classification of aliens into those who had declared their intention to become citizens, and permitting such to own land, and prohibiting non-declarants from ownership, did not violate the Equal Protection Clause of the constitution, and said that "the Terraces, who are citizens, have no right safeguarded by the Fourteenth Amendment to lease their land to aliens lawfully forbidden to take or have such lease," and that "the state act is not repugnant to the Equal Protection Clause, and does not contravene the Fourteenth Amendment."

See also:

Porterfield v. Webb, 263 U. S. 225;
Webb v. O'Brien, 263 U. S. 313;
Frick v. Webb, 263 U. S. 326.

sustaining the constitutionality of the California alien land law. The latter case held that the California alien land law did not conflict with the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, and sustained a provision in that law prohibiting aliens from acquiring shares of stock

in any corporation that is or may be authorized to acquire, possess, enjoy or convey agricultural lands. The decision points out that it is within the power of the state to forbid indirect, as well as direct, ownership or control of agricultural land by aliens. If a state is empowered to prohibit an alien from acquiring a single share of stock in a corporation that has power to acquire and own agricultural lands, certainly it has power to prohibit a corporation from owning lands when a majority of its shares are owned by an alien.

Contract Clause.

It seems to us that the ruling in these cases leaves nothing to be said in favor of the claim that the Washington constitutional provision violates any Federal Constitutional provision. In other words, if the prohibition of alien ownership of lands does not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment how can it be asserted with any show of logic or reason, that such a prohibition violates the Commerce Clause or the Contract Clause of the Federal Constitution. We are unable to see how any greater restriction is placed upon the state by the Commerce Clause or the Contract Clause than by the Due Process and Equal Protection Clauses. If the Due Process and Equal Protection Clauses are not violated by the prohibition against alien ownership of lands, certainly the Commerce Clause and Contract Clause are not violated by the same prohibition. It is on this theory that we

have urged on the question of jurisdiction that no serious Federal question is involved in this appeal and that the appeal should be dismissed upon that ground for that reason, if for no other.

Furthermore, as to the Contract Clause, we have already advanced the argument that in any event that clause cannot be called in question in this case in view of the holding of the Supreme Court in the two cases (*State v. Natsuhara,* 136 Wash. 437, and *State v. Motomatsu,* 139 Wash. 639) heretofore referred to, that the anti-alien ownership statute (ch. 50, L. of 1921) would not apply to conveyances or rights acquired prior to its enactment, and that, therefore, the allegations of the complaint that the governor and attorney general have threatened to proceed under that statute should be disregarded. If the case is considered as one arising solely under the provisions of the Washington constitution with respect to alien ownership of lands, the Contract Clause could not, in any event, be brought into issue because the easements in the real estate in question were acquired by appellants in the year 1917, whereas, the state constitutional provision in question is a part of the constitution adopted, and which became effective November 11, 1889, upon the proclamation of the President of the United States, admitting Washington state into the Union. *Moore v. Perrott,* 2 Wash. 1.

We scarcely need cite any authority for the rule that the Contract Clause of the Federal Constitution

applies only to legislation subsequent in time to the contract alleged to have been impaired.

Munday v. Wisconsin Trust Co., 252 U. S. 499.

Therefore, if the case is considered on the basis of the constitution alone, which is, in fact, the only basis upon which a decision could be rendered conformable to the facts, the rights of appellants were all acquired long subsequent to the adoption of the constitutional provision in question, and therefore there could in no event be any question arise under the Contract Clause.

If, however, the complaint, charging that the state officials have threatened to proceed with escheat proceedings under the provisions of the state constitution (Art. II, sec. 33) and the statute (ch. 50, L. '21) to which a motion to dismiss was directed, requires this court to decide the case upon the assumption that the escheat proceedings alleged to have been threatened would have been taken under chapter 50, Laws of 1921, we will consider for a moment the effect of the Contract Clause with respect to that act, and on the assumption that appellant's conveyances, having been made prior to the adoption of the act, are threatened with escheat under the terms and authority of the act. As we have seen, the right of the state to prohibit ownership of land by aliens is by virtue of the exercise of the police power reserved to the state. When the police power is validly exercised, all Federal constitutional restrictions on the state's power must yield, even the Contract

Clause. The cases most common on this feature are those having to do with the contracts made by public utility corporations with their customers which were abrogated by the state in the exercise of its power to fix rates for public utilities. Such a case is *Union Dry Goods Co. v. Georgia Public Service Corporation,* 248 U. S. 372. On page 375, the court says:

"That private contract rights must yield to the public welfare where the latter is appropriately declared and defined, and the two conflict, has been often decided by this court."

and, on page 376, the court quotes the following from *Atlantic Coast Line R. Co. v. Goldsboro,* 232 U. S. 548:

"It is settled that neither the 'Contract' clause nor the 'Due Process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

See also:

Raymond Lumber Company v. Raymond Light & Water Co., 92 Wash. 330;

State ex rel. Pratt v. Seattle, 73 Wash. 396.

This rule has been applied not only to sustain the abrogation of contracts with public utility companies for service, but also has been applied to contracts of an entirely different nature. For example, in the case of *Mangault v. Springs,* 199 U. S. 473, a contract between two individuals by which one agreed to re-

move a dam from a river and to thereafter permit the waters to flow uninterruptedly, was completely nullified by an act of the legislature authorizing the reconstruction and maintenance of the dam by one of the parties to the contract. This court sustained the act of the legislature. On page 480, the court says:

"It is the settled law of this country that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

Also in the case of *Marcus Brown Co. v. Feldman*, 256 U. S. 170, the court sustained a New York statute regulating tenancies of property, providing that only reasonable rental should be exacted, and, in effect, permitting the tenant to remain in possession as long as willing to pay a reasonable rental. From the case it appears that the tenant had made the lease prior to the enactment of the statute, in which he contracted to pay a certain rental, and agreed upon the expiration of the lease to vacate and surrender the premises. The tenant refused to vacate upon the expiration of the lease, and the owner brought ouster proceedings. The court sustained the validity of the statute, even though its effect was to completely nullify the lease made by the tenant with the owner before the statute was enacted. On page 198, the court says:

"In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession and of the new lease which was to have gone in effect upon October 1, last year. But contracts are made subject to this exercise of the power of the state when otherwise justified, as we have held this to be."

The *Marcus Brown* case was again considered, and the rule applied in the later case of *Levy Leasing Co. v. Siegel,* 258 U. S. 242.

Thus, it is seen that even contracts must fall before the proper exercise of the police power; and, as we have heretofore pointed out, it has been held by this court in the case of *Terrace v. Thompson,* 263 U. S. 197, that the enactment of chapter 50 of the Laws of 1921, was a valid exercise of the police power of the state.

Under the heading of "Contract Impaired, Equal Protection and Due Process of Law Denied," beginning on page 37, appellant, in its brief, discusses the contract feature in such a manner that we do not quite understand its application to the present case. For example, appellant states that the closing sentence of section 33 of article II of the state constitution, reading that

"Every corporation, a majority of the capital stock of which is owned by aliens shall be considered an alien for the purpose of this prohibition,"

violates the Contract Clause of the Federal Constitution, as well as other constitutional provisions. We see no grounds whatever for that claim. Appellant follows this, on pages 38 to 49 of its brief, with the

argument and citations of numerous authorities, beginning with *Providence Bank v. Billings*, 4 Peters 514; and *Dartmouth College v. Woodward*, 4 Wheat. 518, to the effect that a private corporation is an individual entity wholly separate and apart, in a legal sense from and in nowise affected by changes in the ownership of its capital stock, and that the charter of a private corporation is a contract within the meaning of the Contract Clause of the Federal Constitution. We confess our inability to understand the application of the cases or argument to the case at bar. It certainly needs no citations of authority to establish the rule that a private corporation is an individual entity, wholly separate and apart, and in no manner affected by changes in the ownership of its capital stock, but the argument is further advanced on page 39 of the brief that under the closing sentence of section 33, article II of the State Constitution, a non-consenting and helpless minority stockholder of a Washington corporation might be deprived of his property, irreparably injured and left entirely without redress by transfer to aliens of a majority of the capital stock. We do not see how appellant can complain of this feature of the constitutional provision. Appellant was not organized as a corporation under the laws of the state of Washington until the year 1917, at which time the constitutional provision was in full force and effect. It is fundamental that a corporation organized under any statute must necessarily be organized and obtain

its charter subject to any provisions of the constitution that are applicable. Furthermore, the supreme court of the state of Washington answered this argument of appellant in the case of *State ex rel. Winston v. Hudson Land Co.*, 19 Wash. 85. This case was an escheat proceeding instituted against a corporation under the state constitutional provision. It appeared in that case that at the time the property was conveyed to the corporation, a majority of the capital stock of the corporation was actually owned by citizens, and that afterwards the ownership of a majority of the stock passed to aliens. Considering this feature of the case, and applying the last sentence of the constitutional provision, against which appellant is directing its argument in the part of its brief to which we are now referring, the court, on page 87, said:

"We cannot understand what meaning could be attached to this last provision of the act, if a corporation, the majority of the capital stock of which is owned by aliens, is allowed to become the owner of lands. It is contended by the appellant that, because a majority of the stock of this corporation was owned by citizens at the time the land was transferred to the corporation, it would work an injury and a hardship upon the corporation and upon the owners of stock thereof to hold this transfer void, and that, had it been the intention of the constitutional convention to make such an application of the law as this, language more explicit could, and surely would, have been used. We do not think that language more explicit could have been used. Presumably the members of the constitutional convention regarded this question as of great importance, and the article

doubtless was passed after careful consideration and revision; and the whole article shows that it was the intention of the law that the ownership of lands by aliens should be prohibited, and that it should be prohibited despite of subterfuges which might be resorted to by aliens for the purpose of becoming such owners; and we have already seen the wisdom of the makers of the constitution in clothing this article in language which is so plain that it is not susceptible of judicial construction. First, attempts have been made, in the case just above referred to, by aliens to become owners of land through the medium of leases which in effect conferred ownership, and now the constitution is again sought to be avoided and benefits obtained under it by indirection which could not be obtained by direct action. We have no doubt that corporations have it within their power to protect themselves from the dire consequences and hardships which are suggested by appellant in his brief by reason of members of a corporation selling stock to aliens in the corporation; but, if they cannot, our laws confer certain benefits on, and exemptions to, corporations which are valuable, and if men see fit to enter into corporations for the purpose of doing business instead of doing it as individuals, and accept the benefits which the law confers upon the corporation, they must also accept the burdens which are incident to a corporate investment. But outside of all this, when it once becomes the established law that deeds of this character are void, members of corporations will not be quick to obtain such deeds, and the hardships dilated on by the appellant will be more in theory than practice. But even if it be conceded that these hardships would have to be endured, the evident spirit of the constitution must be sustained."

As above stated, we do not dispute the principle first announced in the *Dartmouth College* case, that the charter of a corporation is a contract which may

not be impaired without violating the Contract Clause of the Federal Constitution, but, as every lawyer knows, following the decision in that case, it became the practice of the states to insert either in its corporation law or constitution, a reservation of the power to alter or amend such charter. Such a provision is contained in section 1 of article XII of the Washington state constitution, and reads as follows:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law."

Of course, this constitutional provision became a part of any charter or license granted appellant as a corporation in this state, and the power of the state to alter or amend the laws under which corporations were organized or to restrict the business of a corporation has been decided in many cases in the supreme court of Washington, of which the following are illustrative:

Union Trust Co. v. Moore, 104 Wash. 150;
Duke v. Force, 120 Wash. [redacted]

This power has likewise been sustained by many decisions of this court, some of which are cited in the case of *Duke v. Force, supra.*

As we have stated, it is not clear to us how the cases cited by appellant on this point have any bear-

ing on the case, and it is not clear to us what application is intended to be given to them in this case. Certainly, the right of the state to enact chapter 50, Laws of 1921, is not curtailed by the fact that appellant may have been organized under the general corporation laws of this state enacted prior to the adoption of that statute; and certainly, if the case is considered only with respect to the constitutional prohibition against alien ownership of lands, appellant's charter or license, granted subsequent thereto, must be subject to that constitutional provision. The argument is made by appellant (p. 42 of its brief) that because it is authorized by its charter to "buy, sell, own and operate power plants, transmission lines and power stations, also to buy, sell and mortgage real estate in connection with its business of selling and distributing electric current for lighting and power purposes," that its charter with these provisions becomes a contract within the meaning of the Contract Clause of the constitution. This may be conceded, but certainly the charter, or the provisions of the articles of incorporation cannot transcend the constitutional inhibition against ownership of lands by a corporation, of which a majority of its capital stock is owned by aliens. It is a well-established principle that a corporation may not, by the enumeration of its powers in its articles of incorporation, secure rights or powers not otherwise authorized by the constitution or laws of the state in which it is organized.

Spokane v. Amsterdamsch, 22 Wash. 172; *Parsons v. Tacoma Smelting Co.*, 25 Wash. 492.

At this point we may briefly note appellant's argument (pp. 38 and 40 of its brief) that section 33, article II of the state constitution, prohibiting alien ownership of lands, is in conflict with section 12 of article I of the same constitution, providing that "no law shall be passed granting to any citizen, class of citizens or corporation, other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations," and that therefore, the former provision must yield to the latter. We see no conflict between these two provisions. Although in the argument, section 12 of article I is referred to as the more dominant provision, we see no reason why one provision should dominate the other, so long as both may be equally effective. Apparently, under appellant's theory all corporations should be entitled to exercise exactly the same privileges; that a banking corporation should be entitled to exercise the powers of a railroad corporation, or a real estate corporation the powers of a banking corporation. This is surely not the law. The legislature undoubtedly has power to classify corporations and restrict the powers to different classes.

On pages 40 and 41 of its brief, appellant refers to, and quotes from the decision of the supreme court of the state of Washington in the case of *Hastings v. Anacortes Packing Co.*, 29 Wash. 224, and in this

connection refers to section 3852, Rem. Comp. Stat., a copy of which is set out in full as appendix 2 to appellant's brief. Again, we do not follow appellant in its argument that this case or the statute referred to have any particular bearing on the question before the court. In the case referred to, the supreme court of this state held that a corporation organized under the laws of the state of Washington, although a majority of its capital stock might be owned by aliens, would not be considered an alien for all purposes, and incapable of acquiring fishing licenses or fishing locations in the waters of the state. Section 33 of article II of the state constitution is referred to as declaring an alien within the provisions of that section to be any corporation of which the majority of its capital stock is owned by aliens, and it was there decided that any such corporation shall not be considered an alien for all purposes, or for any other purpose than ownership of lands. Furthermore, section 3852 of Rem. Comp. Stat., relates solely to the powers of foreign corporations, and authorizes such corporations, when organized for purposes for which domestic corporations may be formed, to acquire, purchase, hold, sell, convey or otherwise dispose of real estate or personal property necessary or convenient to carry into effect the objects and purposes of its incorporation. The section also contains the following express proviso:

"And provided further, that no corporation, the majority of the capital stock of which is owned by

aliens other than those who in good faith have declared their intention to become citizens of the United States, shall acquire the ownership of any lands in this state other than lands containing valuable deposits of minerals, metals, iron, coal or fireclay, and the necessary land for mills and machinery to be used in the development thereof, and the manufacture of the products therefrom, except where acquired under mortgage, or in good faith in the ordinary course of justice in the collection of debts."

Appellant is a domestic corporation and the state makes no contention that because a majority of its capital stock is owned by an alien that it is an alien, except as to the ownership of lands, and so, again, we do not understand how this decision of the supreme court of Washington or the section of the statute referred to, can be applied to afford appellant any protection against the constitutional provision prohibiting the ownership of lands by a corporation of which the majority of its capital stock is owned by aliens.

Furthermore, in the case of *State ex rel. Morrell v. Superior Court,* 33 Wash. 542, the supreme court of Washington held that a foreign corporation (the Northport Smelting and Refining Company) had no power to condemn lands for a right of way to conduct water to its smelter, because, being an alien, it could not under the constitutional inhibition against alien ownership of lands, acquire, own and hold such property rights. In that case the corporation contended that under the provisions of section 7214, Pierce's Code, section 4291, Bal. Code, a foreign corporation

was authorized to do any and every act which a domestic corporation might do if organized for the same purpose. The sections of Pierce's Code and Bal. Code there referred to are identical with section 3852 of Rem. Comp. Stat., referred to by appellant in the case now before the court. In answering the contention of the corporation made in the *Morrell* case, the court, on page 550, says:

"It is said, however, by respondent, that under the provisions of Sec. 7214, Pierce Code, Sec. 4291, Bal. Code, any corporation incorporated under the laws of any state or territory in the United States, or in any foreign state or country, for any purpose for which a domestic corporation is authorized to be formed under the laws of this state, shall have power to do any and every act which a domestic corporation may do, on complying with the conditions prescribed under the statute, which conditions were complied with in the case at bar. But it certainly will not be contended that any statute could remove the constitutional inhibition providing that the ownership of lands by aliens is prohibited in this state and especially providing that every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition. So that a statutory argument is entirely without force."

This seems to definitely answer the contention of appellant, so far as we are able to understand it, with respect to any application that section 3852 of Rem. Comp. Stat. may have.

Commerce Clause.

Appellant's principal reliance seems to be that the state constitutional provision violates the Com-

merce Clause of the Federal Constitution, due to the fact that appellant is engaged in transmitting electrical current by means of a power line constructed on the easements for right of way which are involved in the action, from a point in Canada across the Canadian border to various points within the state of Washington. We will concede, under the authority of the case of *Public Utilities Com. v. Attelboro Steam & Electric Co.*, 273 U. S. 83, that the transmission of electric current between a point in Canada and a point in the United States would be foreign commerce, and as such, entitled to any protection that the Commerce Clause is able to afford. We do not, however, concede that the prohibition of ownership of real estate directly affects foreign commerce. The facts presented by this case are entirely different from the facts presented by cases where the state has attempted to place some burden on interstate or foreign commerce. The only thing the state has done in this instance is to prohibit alien ownership of land, and if such a prohibition affects foreign commerce, it is only indirectly.

In the case of *Munday v. Wisconsin Trust Co.*, 252 U. S. 499, the court considered a Wisconsin statute which prohibited foreign corporations from transacting business, or acquiring, holding or disposing of property without having complied with certain statutory requirements with respect to registration, and providing that every contract made by such foreign corporation relating to property within

the state before having complied with the statutory requirements should be wholly void. The corporation in question in that case was a Maine corporation, and in the state of Illinois secured deeds to certain real property in the state of Wisconsin. In an action in the state court the deeds were held void because of failure of the corporation to comply with the Wisconsin statute relating to foreign corporations. The claim was made in behalf of the corporation that the statute as applied violated the Contract Clause, the Due Process Clause and the Equal Protection Clause of the Federal Constitution. Apparently, also, the corporation claimed that the Commerce Clause of the Constitution was violated. This court held, however, that the Contract Clause was not involved as the statute in question had been enacted prior to the transaction in question, and also that the Due Process Clause was not violated, and on page 503 said:

"Where interstate commerce is not directly affected, the state may forbid foreign corporations from doing business or acquiring property within her borders, except upon such terms as those prescribed by the Wisconsin statute. * * * No interstate commerce was directly involved in the transaction here questioned. Moreover, this court long ago declared: 'The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate',"—citing

U. S. v. Crosby, 7 Cranch 115.

A similar rule was applied to a foreign corporation with respect to doing business and owning real estate in *Fritts v. Palmer,* 132 U. S. 282. Again, in

the case of *Diamond Glue Co. v. U. S. Glue Co.*, 187 U. S. 611, it appeared that a foreign corporation had failed to qualify to do business in the state of Wisconsin, as required by law. It entered into a contract with a Wisconsin corporation which involved the erection of a glue factory in Wisconsin, and the management of the production of the factory by the foreign corporation. It was contemplated by the contract that shipments of glue would be made to points outside the state of Wisconsin. The court refused to give any efficacy to the contract. Similar cases are *Mugler v. Kansas*, 123 U. S. 623, and *Kidd v. Pearson*, 128 U. S. [redacted], which involved the power of the state to prohibit the manufacture and sale of intoxicating liquor, even though the manufacture was for the purpose of shipment outside the state. In these cases the court held that interstate commerce was not directly affected.

We, therefore, assert that the action of the state in prohibiting ownership of land by aliens is not a direct interference with foreign commerce, which is prohibited by the Federal Constitution and such as was held prohibited in the case of *Public Utilities Commission v. Attelboro Steam & Electric Co.*, 273 U. S. 83, where the public service commission of Rhode Island attempted to fix the rate to be charged by a corporation for bringing in from a point outside the state electrical current and selling it to another company for distribution in the state of Rhode Island.

Furthermore, under the police power, which is the power by virtue of which the state prohibits alien ownership of lands, the state may even directly interfere with interstate commerce. Under this power the state may, even though directly affecting interstate commerce, regulate and control the manner of running and operating interstate railroad trains:

Gulf, C. & S. F. R. Co. v. Texas, 246 U. S. 58;
Herrington v. Georgia, 163 U. S. 299;
N. Y. Ry. Co. v. N. Y., 165 U. S. 628;
Gladsen v. Minnesota, 166 U. S. 427;
L. S. Ry. Co. v. Ohio, 173 U. S. 285;
St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518,

may provide for inspection of commodities moving in interstate commerce,

Turner v. Maryland, 107 U. S. 38,

may enforce quarantine provisions on interstate shipments,

O. W. R. & N. v. Washington, 270 U. S. 87,

may prohibit the shipment in interstate commerce of green or unripe citrus fruit,

Sligh v. Kirkwood, 237 U. S. 52,

may prohibit exportation of wild game,

Geer v. Conn., 161 U. S. 519,

may prohibit importation of game from foreign countries,

New York ex rel. Silz v. Hesterberg, 211 U. S. 31,

may tax instrumentalities used in interstate commerce,

Henderson Bridge Co. v. Kentucky, 166 U. S. 150;

Postal Telegraph Cable Co. v. Adams, 155 U. S. 688,

and may prohibit the manufacture of intoxicating liquor although intended for transportation in interstate commerce,

Kidd v. Pearson, 128 U. S. 26.

In all of these cases, the action of the state was a direct interference with, or burden upon interstate commerce, or the commodities or instrumentalities shipped or used therein, but in all of them the power of the state was upheld as a valid exercise of the police power, and against which the Commerce Clause of the Constitution was held to be inoperative.

If a state may, without violating the Due Process and Equal Protection Clauses, deprive an alien of his property right to engage in a useful and customary occupation, a right guaranteed him by those clauses (*Truax v. Raich,* 239 U. S. 33), by prohibiting him from owning, leasing, or operating farm lands, as was held in *Terrace v. Thompson,* 263 U. S. 197, why may the state not by the same means, deprive him of his right to engage in interstate commerce? The alien's right under the Commerce Clause is no more sacred than his right under the Due Process and Equal Protection Clauses.

If the right of an alien to own land is subject to

the Commerce Clause, then the law of California, Washington, and any other state prohibiting alien ownership of lands, is a dead letter. If the Commerce Clause is to operate as a restriction on the power of the states in this respect, then an alien may possess himself of land and raise or produce something thereon capable of transportation across a state line and enjoy complete freedom from alien ownership restrictions.

We have cited cases from this court showing the power of the state to prohibit foreign corporations from owning land until compliance with state registration and license laws, and in some of them the power of the state was upheld to restrict persons and corporations from engaging in business even though it appeared that their intention was to engage in manufacture within the state and ship to points outside the state. We admit, however, that it was said in such cases that there was no direct interference with interstate commerce, and admit that there was an intimation in the cases that if it were deemed a direct interference with interstate commerce the power would probably be denied the state. However, we do not now contend, nor do we think it is necessary to contend in this case, that a state would have power to prohibit a corporation organized under the laws of another state of the Union, or an individual resident of another state, engaged in an interstate business,

from owning real estate within the state necessarily used in carrying on interstate business. But, we do contend that a state is empowered, under its police power, to say to an alien citizen, or to an alien corporation, that you may not own real estate, even though you desire to use the real estate in connection with interstate or foreign commerce. If alien individuals or alien corporations are to secure the right to own real estate, whether for use in interstate or foreign commerce, or otherwise, they must secure such rights by means of a treaty between the United States and the country of which they are subjects. This must be so from the necessities of the case. No nation can become great, or prosper, or retain its prestige or power, nor can it successfully wage war when necessity therefore arises, with its lands in alien ownership. All wealth arises from, and is dependent upon, either directly or indirectly, the soil. No greater necessity can be imagined for the right to exercise the police power of the state than arises in connection with the right to alien ownership of lands. As was said by Judge Cushman, speaking for the statutory three-judge court in the case of *Terrace v. Thompson*, 274 Fed. 841, the decision in which was affirmed in *Terrace v. Thompson*, 263 U. S. 197:

"If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow and the structure erected thereon but a

tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out because they were not bound as citizens to defend the house in which they lodged."

Referring again to the case of *Terrace v. Thompson*, 263 U. S. 197, not only do we believe that case settles all questions raised in this case because it specifically decided that the Due Process and Equal Protection Clauses were not violated by the statute prohibiting alien ownership of land, and that as a necessary corollary no other Federal constitutional provisions were violated by such statute, but also, we think that case settled the question as to violation of the Commerce Clause of the Constitution for another reason. It appears from that case on page 222 that for the purpose of bringing *Nakatsuka* (the alien involved) within the provisions of the treaty, the amended complaint alleged that in addition to being a capable farmer, he was engaged in the business of trading, wholesale and retail, in farm products and shipping the same in intrastate, *interstate* and *foreign* commerce. The preamble to the treaty involved declared it to be a "treaty of commerce and navigation." Article I granted the respective citizens of Japan and United States the liberty to enter, travel and reside in the territories of the other country, and to carry on trade, to lease land for commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects. It is very apparent from the language of the treaty that the Japanese subject was au-

thorized to carry on not only intrastate commerce, but also interstate and foreign commerce. If, as the court in its decision determined, the right given the Japanese to engage in interstate and foreign commerce was not violated by the state statute prohibiting alien ownership of land, certainly the same statute would not violate any right given appellant by the Federal Constitution to engage in interstate or foreign commerce.

Many cases are cited by appellant in its brief, pages 50 to 61, including the early case of *Gibbons v. Ogden*, 9 Wheat. 1, to show the restrictions and limitations placed upon the state by virtue of the Commerce Clause. It would serve no useful purpose, and would unduly extend this brief, to show the distinction between the facts in each of those cases and the facts of the case now before the court. We find nothing in them that conflicts with the position we take in this case. In most of them it appears that the state had attempted to tax shipments of commodities moving in interstate commerce, to prohibit the movement of certain commodities in interstate commerce, or to place a tax upon, or require a license for, the privilege of engaging in interstate commerce. These instances were all direct interference with and burdens upon interstate commerce. None of them involve any question at all pertinent to the issues before the court in this case.

Before leaving this phase of the case, we again reiterate that the action of the state in prohibiting

alien ownership of lands is in no sense intended to be, nor is it, in fact, a direct burden upon or interference with interstate commerce, and we again submit that this court, having determined in *Terrace v. Thompson*, 263 U. S. 197, and the cases involving the California alien land law, that the prohibition against ownership of land by aliens is a valid exercise of the police power of the state and does not violate the Equal Protection or Due Process Clauses of the Federal Constitution, it must follow logically from the holdings of those cases that such a prohibition against alien ownership does not violate the Commerce Clause of the Federal Constitution.

Treaty Rights.

It is alleged in the complaint that chapter 50, Laws of 1921, and section 33 of article II of the state constitution are in contravention of and repugnant to certain clauses of the Federal constitution, heretofore considered, and also to the provisions of the Treaty of 1815 between the United States and Great Britain, as extended by the Treaty of 1827. We have heretofore quoted article I of the treaty and will annex to the brief as appendix I the full text of the treaty and the extension thereof. We cannot believe that it is seriously contended that any rights or protection are afforded to appellant by virtue of this treaty. Appellant is a domestic corporation organized under the laws of the state of Washington. It is true that the state constitutional provision in question here

does, after prohibiting ownership of lands by aliens, declare that "every corporation, a majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition." This provision becomes applicable to appellant because it appears from the allegations in the complaint that the West Kootenay Power & Light Company, Ltd., of Canada, an alien corporation, is the owner of a majority of the issued capital stock of appellant. It may well be doubted under such circumstances whether appellant is in any event an alien within the meaning of any treaty negotiated between the United States and any foreign country, and especially an alien of any particular country. The Constitution does not declare that such a corporation shall be considered an alien of Great Britain. We assume that the only reason that appellant feels that it is entitled to some protection under the particular treaty is because a majority of its capital stock is owned by the West Kootenay Power & Light Co., Ltd., of Canada, but, as to that, there is no allegation in the complaint that this corporation is a Canadian corporation, the allegation merely being that it is "an alien corporation." Furthermore, it is difficult to see how the treaty in any event affords any protection or rights to a corporation organized under the laws of the countries negotiating the treaty, or how it affords any protection or any right to a citizen of one of the contracting parties to own stock in a corporation organized under the laws of the other contracting party.

It would seem that, if it was intended to grant the right to citizens or corporations of one of the countries to own stock in a corporation organized under the laws of the other country, some provision to that effect would necessarily have been inserted in the treaty, but we find nothing of this character in the treaty.

The statement or declaration in the constitutional provision is no more, in effect, than a declaration that no corporation organized under the laws of this state shall own real estate if a majority of its capital stock is owned by an alien. Certainly it would be competent for the state, with the powers to grant or withhold to persons the right to organize corporations under its laws, to require as a condition of the granting of such power that the corporation should not be empowered to hold real estate if a majority of its capital stock were owned by an alien. On this theory, appellant would not in any sense be an alien under any treaty. It could hardly be contended that in negotiating a treaty Great Britain had in mind the protection of a corporation organized under the laws of one of the states of the Union, a majority of the capital stock of which might by act of individuals become owned by one of its subjects. It would seem that, if such were the intent of the treaty, it should contain express provisions authorizing the subjects of the respective countries to acquire, own and hold stock in corporations of the respective countries.

However, aside from this, and for the purpose

of argument, let us assume that appellant is an alien subject of Great Britain and as such entitled to any protection or rights afforded to British subjects by the treaty. The preamble of the treaty recites that the United States and His Brittannic Majesty being desirous to regulate the commerce and navigation between their respective countries, territories and people, and in consequence have concluded certain articles of the treaty. In the first article of the treaty it is recited that there shall be between the territories of the United States of America and all the territories of His Brittannic Majesty in Europe a reciprocal liberty of commerce and that the inhabitants of the two countries, respectively, shall have the liberty freely and securely to come with their shipments and cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, and to enter into the same and remain and reside in any parts of the said territories, respectively; and to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively. Article II contains provision with respect to the duties that may be imposed on importations into the United States of articles of growth, produce or manufacture of His Brittannic Majesty's territories in Europe and the duties that may be imposed

on importation into the territories of His Brittannic Majesty in Europe of any articles of growth, produce or manufacture in the United States, and with respect to duties or charges that may be imposed in any ports of the United States on British vessels, and on articles of the United States in ports of His Brittannic Majesty's territory in Europe. Article II, in the concluding paragraph, provides that "the intercourse between the United States and His Britannic Majesty's possessions in the West Indies, and on the continent of North America, shall not be affected by any of the provisions of this article but each party shall remain in the complete possession of its rights in respect to such an intercourse." It is the insertion of this paragraph which leads appellant to the conclusion that article I of the treaty applies to the Dominion of Canada. We confess that it is not entirely clear to us why the parties to the treaty deemed the insertion of this paragraph necessary, but certainly, whatever its purpose, it would be a startling construction to hold that the language of article I, expressly limiting the rights therein conferred to the territories of His Brittannic Majesty in Europe, were modified to the extent of making the treaty applicable to the territories of His Brittannic Majesty not only in Europe but in the West Indies and the continent of North America as well. Furthermore, it is our belief that this treaty is intended only to apply to commerce and navigation on water. It would seem that this is all the contracting parties could have had

in mind in view of the fact that the territories of the respective countries affected by the treaty are separated by water. It recites that the inhabitants of the two countries shall have liberty to come with their ships and cargoes to such places, ports and rivers, to which other foreigners are permitted to come, and remain and reside in any parts of said territory and to hire and occupy houses and warehouses for the purpose of their commerce and generally as merchants and traders to enjoy the most complete protection and security for their commerce. The business in which appellant is engaged is transmittal of electrical current for power and light purposes. In no sense is it a merchant or trader and in no sense is it engaged in shipping or in commerce in connection with shipping as a merchant or trader; nor does it appear that it occupies any house or warehouse for the purpose of commerce.

NECESSARY LANDS FOR MILL AND MACHINERY USED IN DEVELOPING MINING PROPERTY.

It is noted that section 33 of article II of the state constitution, heretofore quoted, contains the following provision:

"* * * Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. * * *"

On page 37 of appellant's brief it briefly men-

tions this provision and mildly asserts its position to be that the land burdened with transmission lines and substations necessary for delivery of power used in the operation of mills and machinery necessary for the development of mineral lands is in fact necessary land for mills and machinery used in the development of the mines. As stated by appellant, it does not appear that this clause has ever been construed by the supreme court of the state of Washington. However, we cannot believe that an easement and right of way extending for many miles upon which is a transmission power line carrying electrical current to the mine could by any reasonable construction be regarded as land necessary for mills and machinery in the development of the mine. We cannot see how it can be asserted that a transmission line is in any sense a mill or that it is machinery. A mill or machinery used in connection with the development of a mine have definite and clear meanings and uses to all who are familiar with the mining industry. In addition to this, it appears from the complaint that the transmission line of appellant is used not only for conveying power to the mine but also for furnishing light and power to consumers in the town of Northport and other points in Stevens county, Washington. We feel sure that no court would hold that the land used by appellant for its transmission line is land used for mills and machinery in the development of a mine within the meaning of the exception to the constitutional provision.

Property Rights Such as Appellant's Are Within Constitutional Inhibition.

In considering the nature of the property rights of appellant which it is alleged the state has threatened to escheat, and whether the same, by reason of their nature are subject to escheat, we will consider only whether they are of such a nature that the ownership thereof is prohibited by the state constitutional provision rather than by the state statute. The constitution prohibits "ownership of lands by aliens," whereas the statute defines "ownership" to mean, "to have the legal and equitable title to or the right to any benefit of." Therefore, there is not the slightest question but that the property rights of appellant would fall within the prohibition of the statute. In this connection, this court held in *Webb v. O'Brien*, 263 U. S. 313, in considering the California alien land law which prohibited aliens from owning real property or any interest therein except as prescribed by treaty, that a cropping contract which gave the right to one-half the crops grown on real estate in consideration of services and labor in producing the crop, was prohibited by the California statute, even though the cropping contract expressly provided that the "cropper" should have no interest or estate whatever in the land.

We prefer to consider it on the basis of the language of the constitution rather than the statute, because certainly if it is within the constitutional in-

hibition, it would be within the statutory inhibition; and, as we have heretofore noted, it is our desire, if the court can consistently do so, that the case be determined under the constitutional provisions rather than the statute, due to the inability of the state to institute escheat proceedings under the statute.

The various instruments by which appellant acquired its rights are attached to the complaint as Exhibit "1" and are shown in the transcript of record on pages 7 to 48, inclusive. So far as we have been able to determine, there is little, if any, difference in the legal effect of any of these conveyances, although a few of the conveyances provide that the easement will cease if the land is abandoned for the uses for which granted. We here set forth in full the form of the second instrument attached to the complaint:

"RIGHT OF WAY DEED.

"This Indenture made the eighteenth day of October, A. D. 1917, between Rasmus Malde, bachelor, and Harry W. Bodey, bachelor, of the State of Washington, hereinafter called the grantors, of the first part and the Northport Power & Light Company, a corporation organized and existing under and by virtue of the laws of the state of Washington, hereinafter called the Grantee of the second part, Witnesseth:

"In consideration of the sum of two hundred dollars ($200.00) paid by said Grantee to said Grantors, the receipt whereof is hereby acknowledged, the Grantors do hereby grant, sell, convey and confirm unto said Grantee, its successors and assigns, the full, free and uninterrupted right, liberty, privilege and authority to construct, operate and maintain

its Power Lines, including all necessary and proper poles, wires, fixtures, appliances and appurtenances, over, across and upon a strip of land ninety-nine feet in width in Township Forty (40) North, Range Thirty-nine (39) East W. M. in Stevens County, Washington, the center line of which strip is surveyed and marked upon the ground and is described as follows, to-wit:

"Beginning at a point on the south boundary line of lot 15 in Section 3, Township 40, North, Range 39 E. W. M. to a point 1,130 feet east of the southwest corner of lot nine; thence from last above named point S. 26 degrees and 15 minutes E. as surveyed through, said lot 9 of said section 3 across the southern cross mining lode claim.

"The said strip conveyed being forty-nine and one-half feet on each side of the said center line.

"Also granting unto said Grantee, its successors and assigns, the right, privilege and authority to at all times enter into and upon the said granted strip of land for the purpose of constructing, repairing and maintaining its said power line and for any and all other purposes; also granting the right and privilege unto said Grantee to cut and remove from said granted lands all timber and brush.

"And the Grantors, for themselves, their heirs and assigns, hereby release the said Grantee, its successor and assigns, from any and all claims for damages resulting to the lands in this deed described and conveyed by reason of the location, construction, maintenance and operation of its said Power Lines.

"In witness whereof the said Grantors, of the first part, have hereunto set their hands and seals the day and year first above written.

"Rasmus Malde, Harry W. Bodey."

"State of Washington,
"County of Stevens, ss:

"On this 19th day of October, A. D. 1917, before me personally appeared Rasmus Malde, bachelor, and Harry W. Bodey, bachelor to me known to be the

individuals described in, and who executed the within and foregoing instrument, each and severally, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

"In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

"John H. Bowers,

"Notary Public for the State of Wash., residing at Northport, Wash. My commission expires March 11th, 1921. (Seal John H. Bowers, Notary Public, State of Washington. Commission expires Mar. 11, 1921.)

"Filed for record at the request of F. L. Buell, Northport, Oct. 20, 1917, at 3:07 o'clock P. M. Recorded Oct. 23, 1917. Earle T. Gates, County Auditor. Dorothy Dexter, Deputy."

This instrument is in the form required by the laws of the state of Washington for the conveyance of real estate, and as such entitled to record under the recording laws of the state relating to conveyances of real estate. In most of the conveyances there is no provision for termination of the grant. The only legal question to be determined is whether the interest and rights of appellant acquired under these conveyances amount to "ownership of land" within the meaning of the constitutional provision.

Inasmuch as this question relates to the title to real estate within the state of Washington, we assume that the decisions of the supreme court of this state will be accepted by this court as controlling, and for that reason, will cite and rely principally upon Washington decisions, although we will also cite and

refer to a few decisions from Federal courts and other state courts which we deem pertinent.

This constitutional provision was first considered by our supreme court in the case of *State ex rel. Winston v. Morrison*, 18 Wash. 664. In this case, the court held that a lease of real property for a term of 99 years was prohibited under the constitutional provision, and on page 665, the court says:

"Respondent contends that it is only *absolute ownership* of certain kinds of realty which is prohibited; that the word 'conveyance' means the transfer of title to another and the instrument by which it is done. The question for determination is, what is the meaning of the section of the constitution under consideration? We have not been referred to a case at all similar to the one we are now considering. We think that the section must be given a reasonable interpretation. If a lease for a term of 99 years can be sustained, then why not one for 999 years? And it would seem to require little argument to demonstrate that if a lease for such a term can lawfully be made to an alien the constitutional prohibition against ownership of lands in this state by aliens becomes meaningless; and parties may indirectly accomplish a result which they are forbidden to do directly."

Again, in the case of *State ex rel. Winston v. Hudson Land Company*, 19 Wash. 85, the supreme court of Washington decided that a 49-year lease to real estate would fall within the ban of the constitutional provision.

These two decisions of the supreme court of Washington have never been reversed or modified, but have been cited and referred to in many subsequent decisions of the court. It should be stated,

however, that in the cases of *State v. Natsuhara*, 136 Wash. 437, and *State v. Motomatsu*, 139 Wash. 639, it was held that a lease of real estate for ten years would not be prohibited by the constitutional provision. Both of these cases were decided on the theory that under the decisions of the court in the *Morrison* and *Hudson Land Company* cases, the court deliberately expressed its view that if a lease was for a reasonable length of time, it would be valid, and that that view having been expressed, and it having been generally understood that such was the law, it should be adhered to under the rule of *stare decisis*.

In the case of *State ex rel. Morrell v. Superior Court*, 33 Wash. 542, the court had before it the question as to whether a foreign corporation had the power to condemn a right of way across lands for the purpose of carrying water to its smelter. The condemnation was resisted by the land owner on the grounds that the corporation, being a foreign corporation, was denied ownership of lands under the constitution. The court sustained this contention, and on page 550, says:

"It is also contended by respondent that this is not such an ownership of land as is contemplated by the constitution, that the right of way sought to be condemned might be abandoned, and that the tenure of the corporation is uncertain; but it seems to us that under condemnation laws of the state, the substantial right to the land passes to the corporation; and, so far as duration is concerned, we held in *State ex rel. Winston v. Morrison*, 18 Wash. 664, 52 Pac. 228, that a lease for a term of 99 years was

void under the constitutional provision above referred to, and that it did not refer to absolute ownership; also, in *State ex rel. Winston v. Hudson Land Company,* 19 Wash. 85, 52 Pac. 574; 40 L. R. A. 430, that, under the constitutional provision prohibiting alien ownership of lands, a lease of lands to an alien for the period of 49 years was void; and that the constitutional provision would not be construed away to such an extent that aliens could become owners of land under any circumstances other than circumstances incorporated in the proviso in the constitution itself."

We think that these cases definitely settle this feature of the case, and leave nothing more that need be said. However, in the case of *Moeller v. Gormley,* 44 Wash. 465, it was held that a lease of real estate was an interest in land and that it should be assessed and taxed as real estate and not as personal property.

In the case of *Humphrey v. Krutz,* 77 Wash. 152, it was held that an easement in an alley, although an incorporeal right, is an interest in land, and that a suit may be maintained to quiet title thereto.

In the case of *Pioneer Sand & Gravel Co. v. Seattle C. & D. D. Co.,* 102 Wash. 608, it was held that an agreement between parties to purchase from the state certain lands, and that a certain 60-foot strip thereof should "be kept open and maintained by the parties as a waterway for the accommodation of vessels, boats and other water craft" created an easement in land and a covenant running with the land binding upon the successors in interest to the parties

to the contract. In this case the court considered the question of whether easements are appurtenant or in gross, and we here quote from the language of the court on that feature of the case, in view of the many cases cited by appellant in its brief for the purpose of showing that the interest which it acquired under the conveyances in question was an easement in gross and therefore not real estate or any interest therein. On page 618, the court says:

"The questions as to when covenants do or do not run with the land, and whether easements are appurtenant or in gross, were among the most abstruse and technical questions of the common law. And when one goes to the earlier cases, he meets confusion and conflict. Many of the old doctrines have since been expressly overruled; others seem to be ignored; and more and more equity has come to enforce covenants which technically do not run with the land.

"It is well settled in law that easements in gross are not favored; and a very strong presumption exists in favor of construing easements as appurtenant."

In the case of *United States v. Welch*, 217 U. S. 333, this court considered whether it was necessary for the government in a proceeding to condemn land to pay the value of an easement for ingress and egress to and from private property. The court held that the government should pay for such a right of way and said, "a private right of way is an easement and is land."

In the case of *Western Union Telegraph Company v. Georgia R. & Banking Co.*, 227 Fed. 276, in the United States District Court of Georgia, the tele-

graph company brought an action to enjoin the railroad company from interfering with its telegraph lines on the right of way of the railroad company. The predecessors in interest of the telegraph company had been granted the right by the predecessors in interest of the railroad company to construct, maintain and operate its telegraph lines upon and along the right of way of the railroad company. The railroad company contended that an easement was only a license, and not a grant in perpetuity which would inure to the benefit of the successors in interest of the parties thereto. The court denied this contention and ruled that an easement was an interest in land which would pass to the successors in interest of the grantee, as appears from the following statement in the syllabus:

"An 'easement' such as for the construction and maintenance of a telegraph line on a railroad right of way, as distinguished from a pure or technical easement, is an interest in land, which confers upon its owner some right, benefit, dominion, or lawful use out of or over the estate of another, and is a species of incorporeal hereditament."

The case of *Sims ex rel. State Board of Tax Commissioners v. Fletcher Savings & Trust Company,* (Ind.) 142 N. E. 121, involved the construction of the tax statute of Indiana which permitted a deduction from the tax on the capital stock of banks of the value of such real estate as may be carried in the capital stock account. The bank held a 99-year lease on real estate, the value of which it claimed the

privilege of deducting from the valuation of the capital stock. The taxing officials claimed that the value of the lease should not be deducted because it is personal property and not real estate and should be taxed as personal property. The court held that the leasehold was an ownership in real estate and not personal property.

See also as to the nature of an easement for a right of way:

Goodrich v. Burbank, 12 Allen (Mass.) 459;
Wyatt v. Larimer & Weld Irrigation Co., (Colo.) 33 Pac. 144;
Cook v. C. B. & Q. Ry. Co., 40 Iowa 451;
Tidewater Pipe Company v. Bell, (Pa.) 124 Atl. 351.

On pages 30 to 36, inclusive, of its brief, appellant cites a number of cases for the purpose of showing that the rights in the property which it secured by the conveyances in question are easements in gross and not easements appurtenant, and are consequently only personal property, and as such not within the prohibition of the state constitution against alien ownership of land. It must be admitted that the supreme court of Washington has held in a number of cases that a lease of real estate is personal property, and while that is no doubt true, it does not militate against the position we take in this case and which is sustained by the authorities we have heretofore cited on this subject, that a lease is also an interest in real estate, and when the lease is for a long period of time it is, in fact, ownership of real estate. If a

lease for 49 years is ownership of real estate within the meaning of the state constitutional provision, certainly a perpetual and irrevocable easement and right of way to construct and maintain a power transmission line on real estate is likewise ownership of land within the meaning of that constitutional provision, as under it, as was said in *State ex rel. Morrell v. Superior Court*, 33 Wash. 542, "the substantial right to the land passes to the corporation."

If, however, the case is to turn upon whether appellant's easements are appurtenant or in gross, and upon the existence of a dominant and servient estate, we submit that the mining property of appellant, to which all its easements lead, may be regarded as the dominant estate.

Of the three cases cited from the Washington supreme court on page 31 of appellant's brief, the first involved the right of a real estate broker to recover commission for the sale of a leasehold. The employment of the broker was not in writing, and the statute of fraud required that an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission must be in writing. The court held that the statute did not relate to the sale of personal property and that inasmuch as a lease is a chattel interest, it would not fall within the definition of "real estate" as used in the statute and that the broker would be entitled to recover his commission, although no written agreement had been made for the payment.

The second case involved an action for a broker to recover commission on the sale of a lease, good will and furniture of a rooming house. The broker was not licensed as required by the real estate brokers' act. The court construed a section of the act containing a very ambiguous definition of a real estate broker and decided that the definition did not include selling or offering to sell, or buying or offering to buy, a real estate lease. We see nothing in this case that has any bearing upon the question except possibly the statement that under previous decisions of the court, a leasehold interest is personal property, or a chattel real, and no lawyer, under the common law, could contend otherwise.

The third case cited involved the right of a broker who had procured for another an easement over land to continue so long as the right of way was used for hauling logs, to recover for services. The only question involved was whether the right of way secured was real estate within the meaning of the statute of frauds requiring an agreement authorizing and employing an agent or broker to sell or purchase real estate to be in writing. The court, on the authority of the first case cited on page 31 of appellant's brief, held that this right of way easement was not "real estate" within the meaning of the statute of frauds, and after quoting from that case said:

"If the purchase or sale of a leasehold, regardless of its term of years, is not a sale of real estate, then certainly, the purchase or sale of an easement which by its terms is limited 'to continue so long as

the right of way is used for hauling logs' is not a sale of real estate and is nothing but a chattel interest and is personal property."

We do not believe that these cases in any sense weaken the earlier decisions of the Washington supreme court to the effect that a lease for an unreasonable length of time and that an easement for a right of way across lands for the purpose of conducting water are ownership of lands within the meaning of the constitutional inhibition against alien ownership of lands. Certainly the rights obtained by appellant in the conveyances received by it, "all the substantial right to the land," are perpetual and irrevocable, and have all the attributes of ownership of the land.

CONCLUSION.

In conclusion, we submit that the district court had no jurisdiction in this case, because (1) the plaintiff (appellant here) had a plain, adequate and complete remedy at law, (2) the action is in effect one against the state, prohibited by the eleventh amendment, and, (3) no Federal question is presented in the issues that had not been already adversely determined to plaintiff's contentions, either expressly or by analogy; and further, that on the merits the declaration of the Washington constitution against ownership of land by aliens, or by a corporation of which the majority of its capital stock is owned by aliens, prohibits plaintiff from owning the rights of way for its power transmission line, and that this

constitutional inhibition does not interfere with any rights of plaintiff under the Commerce or Contract Clauses or any other provision of the Federal Constitution, and does not violate any rights accorded plaintiff under any treaty.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General,

JOHN A. HOMER,
Assistant Attorney General.

Attorneys for Appellees.

APPENDIX I.

1815

CONVENTION OF COMMERCE AND NAVIGATION

The United States of America and His Britannick Majesty being desirous, by a convention, to regulate the commerce and navigation between their respective countries, territories and people, in such a manner as to render the same reciprocally beneficial and satisfactory, have respectively named Plenipotentiaries, and given them full powers to treat of and conclude such convention, that is to say:

The President of the United States, by and with the advice and consent of the Senate thereof, hath appointed for their Plenipotentiaries John Quincy Adams, Henry Clay, and Albert Gallatin, Citizens of the United States; and His Royal Highness the Prince Regent acting in the name and on the behalf of His Majesty, has named for his Plenipotentiaries the Right Honourable Frederick John Robinson, Vice-President of the Committee of Privy Council for Trade and Plantations, Joint Paymaster of His Majesty's Forces, and a member of the Imperial Parliament, Henry Goulburn, Esquire, a member of the Imperial Parliament, and Under Secretary of State, and William Adams, Esquire, Doctor of Civil Laws:

And the said Plenipotentiaries, having mutually produced and shown their said full powers, and exchanged copies of the same, have agreed on and concluded the following articles, *vide licet*:

Article I.

There shall be between the territories of the United States of America, and all the territories of His Britannick Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with

their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively.

ARTICLE II.

No higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce or manufacture of His Britannick Majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of His Britannick Majesty in Europe of any articles the growth, produce or manufacture of the United States, than are or shall be payable on the like articles being the growth, produce or manufacture of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries, on the exportation of any articles to the United States, or to His Britannick Majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any articles the growth, produce or manufacture of the United States, or of His Britannick Majesty's territories in Europe, to or from the said territories of His Britannick Majesty in Europe, or to or from the said United States, which shall not equally extend to all other nations.

No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels

of the United States; nor in the ports of any of His Britannick Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels.

The same duties shall be paid on the importation into the United States of any articles the growth, produce or manufacture of His Britannick Majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels, and the same duties shall be paid on the importation into the ports of any of His Britannick Majesty's territories in Europe, of any article the growth, produce or manufacture of the United States, whether such importation shall be in British vessels or in vessels of the United States.

The same duties shall be paid, and the same bounties allowed, on the exportation of any articles the growth, produce or manufacture of His Britannick Majesty's territories in Europe to the United States, whether such exportation shall be in vessels of the United States or in British vessels; and the same duties shall be paid, and the same bounties allowed, on the exportation of any articles the growth, produce or manufacture of the United States, to His Britannick Majesty's territories in Europe, whether such exportation shall be in British vessels or in vessels of the United States.

It is further agreed that in all cases where drawbacks are or may be allowed upon the re-exportation of any goods the growth, produce or manufacture of either country, respectively, the amount of the said drawbacks shall be the same, whether the said goods shall have been originally imported in a British or an American vessel; but when such re-exportation shall take place from the United States in a British vessel, or from the territories of His Britannick Majesty in Europe in an American vessel, to any other foreign nation, the two contracting parties reserve to themselves, respectively, the right of

regulating or diminishing, in such case, the amount of the said drawback.

The intercourse between the United States and his Britannick Majesty's possessions in the West Indies, and on the continent of North America, shall not be affected by any of the provisions of this article, but each party shall remain in the complete possession of its rights, with respect to such an intercourse.

ARTICLE III.

His Brittanick Majesty agrees that the vessels of the United States of America shall be admitted and hospitably received at the principal settlements of the British dominions in the East Indies, *vide licit*: Calcutta, Madras, Bombay, and Prince of Wales' Island; and that the citizens of the said United States may freely carry on trade between the said principal settlements and the said United States, in all articles of which the importation and exportation, respectively, to and from the said territories, shall not be entirely prohibited; provided only, that it shall not be lawful for them, in any time of war between the British Government and any State or Power whatever, to export from the said territories, without the special permission of the British Government, any military stores, or naval stores, or rice. The citizens of the United States shall pay for their vessels, when admitted, no higher or other duty or charge than shall be payable on the vessels of the most favor'd European nations, and they shall pay no higher or other duties or charges on the importation or exportation of the cargoes of the said vessels than shall be payable on the same articles when imported or exported in the vessels of the most favored European nations.

But is it expressly agreed that the vessels of the United States shall not carry any articles from the said principal settlements to any port or place, except to some

port or place in the United States of America, where the same shall be unladen.

It is also understood that the permission granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories; but the vessels of the United States having, in the first instance, proceeded to one of the said principal settlements of the British Dominions in the East Indies, and then going with their original cargoes, or part thereof, from one of the said principal settlements to another, shall not be considered as carrying on the coasting trade. The vessels of the United States may also touch for refreshment, but not for commerce, in the course of their voyage to or from the British territories in India, or to or from the dominions of the Emperor of China, at the Cape of Good Hope, the island of St. Helena, or such other places as may be in the possession of Great Britain, in the African or Indian seas; it being well understood that in all that regards this article the citizens of the United States shall be subject, in all respects, to the laws and regulations of the British government from time to time established.

ARTICLE IV.

It shall be free for each of the two contracting parties respectively to appoint Consuls for the protection of trade, to reside in the dominions and territories of the other party; but before any Consul shall act as such, he shall, in the usual form, be approved and admitted by the Government to which he is sent; and it is hereby declared that, in case of illegal or improper conduct towards the laws or Government of the country to which he is sent, such Consul may either be punished according to law, if the laws will reach the case, or be sent back, the offended Government assigning to the other the reasons for the same.

It is hereby declared that either of the contracting parties may except from the residence of Consuls such particular places as such party shall judge fit to be so excepted.

ARTICLE V.

This convention, when the same shall have been duly ratified by the President of the United States, by and with the advice and consent of their Senate, and by His Britannick Majesty, and the respective ratifications mutually exchanged, shall be binding and obligatory on the said United States and His Majesty for four years from the date of its signature; and the ratifications shall be exchanged in six months from this time, or sooner if possible.

Done at London this third day of July, in the year of our Lord one thousand eight hundred and fifteen.

[SEAL]	JOHN QUINCY ADAMS,
[SEAL]	H. CLAY,
[SEAL]	ALBERT GALLATIN,
[SEAL]	FREDERICK JOHN ROBINSON,
[SEAL]	HENRY GOULBURN,
[SEAL]	WILLIAM ADAMS.

1827

COMMERCIAL CONVENTION

The United States of America, and His Majesty the King of the United Kingdom of Great Britain and Ireland, being desirous of continuing in force the existing commercial regulations between the two Countries, which are contained in the Convention concluded between Them on the Third of July, 1815, and further renewed by the Fourth Article of the Convention of the Twentieth of October, 1818,—have, for that purpose, named Their respective Plenipotentiaries, that is to say:

The President of the United States of America, Al-

bert Gallatin, their Envoy Extraordinary and Minister Plenipotentiary to His Britannick Majesty:

And His Majesty the King of the United Kingdom of Great Britain and Ireland, The Right Honourable Charles Grant, a Member of His said Majesty's Most Honourable Privy Council, a Member of Parliament, and Vice President of the Committee of Privy Council for Affairs of Trade and Foreign Plantations; and Henry Unwin Addington, Esquire:

Who, after having communicated to each other their respective Full Powers, found to be in due and proper form, have agreed upon and concluded the following Articles:

ARTICLE I.

All the Provisions of the Convention concluded between the United States of America, and His Majesty The King of the United Kingdom of Great Britain and Ireland, on the Third of July, 1815, and further continued for the term of ten years by the fourth Article of the Convention of the Twentieth of October, 1818, with the exception therein contained, as to St. Helena, are hereby further indefinitely, and without the said exception, extended and continued in force, from the date of the expiration of the said ten Years, in the same manner as if all the Provisions of the said Convention of the Third of July 1815, were herein specifically recited.

ARTICLE II.

It shall be competent, however, to either of the Contracting Parties, in case either should think fit, at any time after the expiration of the said ten years,—that is, after the Twentieth of October, 1828,—on giving due notice of twelve months to the other Contracting Party, to annul and abrogate this Convention:—and it shall, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

ARTICLE III.

The present Convention shall be ratified, and the Ratifications shall be exchanged in Nine Months, or sooner if possible.

In Witness whereof, the respective Plenipotentiaries have signed the same, and have affixed thereto the Seals of their Arms.

Done at London the Sixth day of August, in the Year of Our Lord One Thousand Eight Hundred and Twenty-Seven.

[SEAL] ALBERT GALLATIN,
[SEAL] CHA. GRANT,
[SEAL] HENRY UNWIN ADDINGTON.

Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909, Malloy, Volume I, Pages 624 and 645.